Office — Supreme Court, U. S.
FILED
SEP 2 1944
CHARLES ELMORE CROPLEY
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1944

No. 294

CITY BANK FARMERS TRUST COMPANY, formerly known as The Farmers Loan and Trust Company, as Administrator of the goods, chattels and credits of HELEN HALL VAIL, deceased,

Petitioner,

*against*

GEORGE T. McGOWAN, Collector of Internal Revenue for the Twenty-Eighth Collection District, New York.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

## REPLY BRIEF FOR PETITIONER

JAMES LLOYD DERBY,
J. SEYMOUR MONTGOMERY, JR.,
Attorneys for Petitioner,
Office & Post Office Address,
No. 1 Cedar Street,
Borough of Manhattan,
New York City 5, N. Y.

Of Counsel:

MONTGOMERY, GRACE & DERBY,
1 Cedar Street,
New York City 5, N. Y.

KING, TAYLOR, OTHEMAN & SWAIN,
FREDERICK P. KING,
55 Liberty Street,
New York City 5, N. Y.

HINES, REARICK, DORR & HAMMOND,
JOHN K. WATSON,
PAUL SMITH,
61 Broadway,

# INDEX


| | PAGE |
|---|---|
| Argument | 1 |
| Conclusion | 6 |


CITATIONS

Cases:


| | |
|---|---|
| *City Bank Farmers Trust Co.* v. *Hoey*, 101 F. (2d) 9 (1939) | 4 |
| *Commissioner* v. *Greene*, 119 F. (2d) 383; cert. den. 314 U. S. 641 (1941) | 4 |
| *Lewis* v. *Jones*, 50 Barb. 645 (1868) | 5 |
| *Sporza* v. *German Savings Bank*, 192 N. Y. 8 (1908) | 4 |
| *United States* v. *Wells*, 283 U. S. 102 (1931) | 4 |
| *Voorhees* v. *Bank of the United States*, 10 Pet. 449 (1836) | 3 |
| *ex parte Whitbread*, 2 Mer. 99; 35 Eng. Rep. 878 (1816) | 5 |


Regulations:


| | |
|---|---|
| Regulations 80, Art. 16 | 3 |

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1944

No. 294

CITY BANK FARMERS TRUST COMPANY, formerly known as the Farmers' Loan and Trust Company, as Administrator of the Goods, Chattels and Credits of HELEN HALL VAIL, Deceased,

*Petitioner,*

*v.*

GEORGE T. McGOWAN, Collector of Internal Revenue for the Twenty-Eighth Collection District, New York

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

## REPLY BRIEF FOR PETITIONER

While respondent, in its brief in opposition to petitioner's application for a writ of certiorari, goes into the merits of the controversy and the questions of law involved at some length, this short reply brief will be confined principally to pointing out certain misapprehensions as to the facts and the Record which might arise from statements in respondent's brief. The dissenting opinion in the Circuit Court of Appeals below adequately testifies that there is ample to be said in petitioner's behalf on the merits.

1. Respondent's brief, pp. 17, 18:

> "Both the District Court and the court below have found that, insofar as the allowances exceeded those which the decedent had actually made prior to incompetency, they were meant to be advancements to the decedent's heirs on account of the property which they would receive at her death and as a result thereof."
>
> * * * *
>
> "* * * and, since the allowances, so far as they exceeded $6,000 per year to the decedent's living daughter and a like amount to the minor boys of her deceased daughter (see Statement, supra, p. 4), actually constituted advancements to them on account of what they would receive of the decedent's property as her heirs at her death, * * *"

These are misstatements of the record. What the allowance orders in fact provided was that should there ultimately be any inequality in the amount of allowances paid out of the incompetent's surplus income as between her daughter and the guardian of her deceased daughter's minor sons, any excess paid to the one or to the other should be considered as an advancement (R. 17, 23). There was in fact no such inequality or excess of payments and therefore no portion of the allowances in fact constituted advancements (R. 26-34). There was no provision in the orders referring to allowances paid in excess of $6,000 per year or creating any relationship whatsoever between such sum and the question of whether any part of the payments should be considered advancements, and respondent's statement, above quoted, that the District and Circuit Courts below found otherwise is incorrect. The Court's attention is directed to the fact that even under the Treasury Department regulations which were in effect at the time of this decedent's death, "The fact that a gift was made as an advancement to be taken into account upon the final distribution of

the decedent's estate is not, in and of itself, determinative of its taxability." (Regulations 80, Article 16, last paragraph.)

Moreover the statements above quoted give the incorrect impression that $6,000 per year was the maximum amount that the incompetent had given to each of her daughters while she was sane. In fact, prior to her incompetency the incompetent's course of conduct toward her daughters was marked by unusual generosity evidenced by additional lavish gifts in money and money's worth. (See for example, R. 134, 135, 166, 229, 230, 231, 232, 303, 304).

Under the New York law, its Supreme Court in the exercise of its equitable discretion in granting allowances is not limited, as respondent's brief implies, to the amount or amounts which the incompetent had given while sane. It must be assumed, for the purpose of this action, that the allowance orders were within the jurisdiction of the New York Court. *Voorhees* v. *Bank of the United States*, 10 Pet. 449 (1836). But, over-generous distribution, even if indulged in by the New York Court (which we deny), is not automatically testamentary in nature or in contemplation of death. And it is not the province of the Treasury Department or of the Federal Courts to impose a sanction on the free exercise of the equitable jurisdiction of the State Courts in granting allowances by taxing said allowances to the extent that they exceed what the incompetent had given while sane.

2. Respondent, on page 7 of its brief, refers to remarks of counsel which were made in the course of the second allowance proceeding. It is necessary to point out that these remarks refer only to the proposed increases in the allowances, particularly to the retroactive increase extending back to the date of the first allowance order; they have no bearing on the original allowance of $50,000 per annum given by the first allowance order. In any event, it is

obvious that remarks of counsel for one of the parties made in hearings before a referee can not be imputed to the court nor can the court's motive in making an order be determined thereby.

3. At page "14" and "15" of their brief, counsel for the Government dispute the petitioner's contention that the decision of the Court below is in conflict with *United States* v. *Wells*, 283 U. S. 102 (1931), because, "Nothing in the *Wells* case justifies a conclusion that the Court either in substance or effect condemned the attribution to an incompetent of a gift made for her by a duly constituted agent in contemplation of her death". The conflict with the *Wells* case arises from the fact that there the Court held that the differentiating factor between a gift *inter vivos* not subject to the Estate Tax and one in contemplation of death must be found in the transferor's motive. The power of the Court to deal with an incompetent's estate is not derivative from the incompetent but it is inherent in the Court. *Sporza* v. *German Savings Bank*, 192 N. Y. S. 14 (1908). Obviously the relationship of principal and agent, contractual in its nature, does not exist between an insane person, incompetent to make a will and a Court of equity. The distinction is apparent in the enactment of the Gift Tax Law, where motive is immaterial. *Commissioner* v. *Green*, 119 F. (2d) 383; certiorari denied, 314 U. S. 641 (1941). In the case cited, the Court concluded its opinion: "Respondent's contention that there was no donative intention is immaterial because §563 of the Act in question does not require it." Thus respondent can derive no aid from the taxation of some of these allowance payments as gifts under the holding of *City Bank Farmers Trust Co.* v. *Hoey*, 101 F. (2d) 9 (1939), which is stressed in its brief. Whatever the relationship between the New York Courts and the incompetent, it is clear that it did not, under the New York law, extend to the Court the power to indulge in motives, in her behalf, such

as to brand the allowances as testamentary dispositions or transfers in contemplation of death.

*Ex Parte Whitbread*, 2 Mer. 99; 35 Eng. Rep. 878 (1816);
*Lewis* v. *Jones*, 50 Barb. 645 (1868).

4. Respondent's brief, p. 17:

> "Its contention is that the New York court had no power under local law to make a transfer of any portion of an incompetent's property and has not expressly stated that it did, and that consequently it must be presumed conclusively, even contrary to the fact, that it did not do so."

This completely misstates petitioner's contention. The applications for allowances were necessarily predicated on the existence of such a power. Petitioner's position is that the authority and jurisdiction which the New York courts enjoy is limited in nature and does not extend to the making of transfers of a testamentary nature or in contemplation of death and that consequently respondent's characterization of these transfers as such necessarily involves the assertion that the New York State Court exceeded its jurisdiction in granting the allowances.

5. Finally, it is to be noted that the respondent's brief makes no mention of the point which most troubled the majority of the Circuit Court of Appeals below, namely, the taxability of the allowances made to four sisters and a brother—collateral relatives as to whom the issue of "anticipation of succession" (which is not the test under the Federal Estate Tax Law) could not arise.

## CONCLUSION

### Certiorari Should Be Granted

Respectfully submitted,

JAMES LLOYD DERBY
J. SEYMOUR MONTGOMERY, JR.,
Attorneys for Petitioner,
Office & Post Office Address,
No. 1 Cedar Street,
Borough of Manhattan,
New York City 5, N. Y.

Of Counsel:

MONTGOMERY, GRACE & DERBY,
1 Cedar Street,
New York City 5, N. Y.

KING, TAYLOR, OTHEMAN & SWAIN,
FREDERICK P. KING,
55 Liberty Street,
New York City 5, N. Y.

HINES, REARICK, DORR & HAMMOND,
JOHN K. WATSON,
PAUL SMITH,
61 Broadway,
New York City 6, N. Y.